

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0121015452:

LISA BOYINGTON,)	Case No. 775-2013
)	
Charging Party,)	
)	
vs.)	
)	POST HEARING SEALING
MONTANA DEPARTMENT OF)	AND UNSEALING ORDER
CORRECTIONS-PROBATION AND)	
PAROLE,)	
)	
Respondent.)	

* * * * *

This order issues at the same time as the Hearing Officer's Decision and Notice of Administrative Decision herein, defining what exhibits and what testimony is now sealed, and how that status may be challenged or changed hereafter.

1. The Hearing Officer's purposes in issuing this order are threefold. First, it is hoped that this order will allow the parties an opportunity to protect the privacy rights of non-parties who have subjective or actual expectations of privacy in the information involved that are recognized by society as reasonable under the circumstances and which clearly outweigh the public's right to know the information, or similarly protect Confidential Criminal Justice Information involving persons who are not parties to this proceeding. The exhibits and the testimony were all offered by the parties. Second, this order is intended to provide the parties with a fair opportunity to pin-point and redact information that should be sealed, allowing public access to the rest of the information and safeguarding against disclosure of information that should have been sealed but was not identified with specificity for sealing. Third, this order should resolve any questions about what is sealed and what is in the public record, giving the parties a ten business day window to seek an order staying the unsealing of any or all sealed portions of the record as to which an aggrieved party wishes to maintain the status quo until completion of that review.

2. APPENDIX "I" HERETO LISTS ALL EXHIBITS IN THE RECORD, INDICATING WHICH EXHIBITS ARE CURRENTLY SEALED. ALL EXHIBITS CURRENTLY SEALED ARE SEALED IN THEIR ENTIRETY. APPENDIX "I" IS CURRENT AND SUPERCEDES IDENTIFICATION OF SEALED EXHIBITS IN

THE TRANSCRIPT. The parties hereto and their counsel, and any and all court reporters participating in making the record herein, and any witnesses provided with copies of exhibits by the parties, and the department, and its employees having access to the exhibits in the course of performance of their duties, all are barred and prohibited from providing access to sealed exhibits or to any information therein, for so long as the sealing, or any part of it remains in force and effect. **ANY PARTY MAY, BY NOON M.D.T. ON AUGUST 13, 2014, FILE WITH THE OFFICE OF ADMINISTRATIVE HEARINGS AND SERVE ON THE OTHER SIDE REDACTED VERSIONS OF ANY SEALED EXHIBITS THAT THE FILING PARTY BELIEVES IN GOOD FAITH CAN BE UNSEALED WITH THE REDACTIONS.**

3. EFFECTIVE AUGUST 18, 2014, LISTED SEALED EXHIBITS DESIGNATED WITH FOOTNOTE 3 ("3") AFTER THEIR NUMBERS IN APPENDIX "I" HERETO AND ANY OTHER SEALED EXHIBITS AS TO WHICH AT LEAST ONE PARTY HAS TIMELY FILED A REDACTED VERSION, WILL BE UNSEALED AND AVAILABLE TO THE PUBLIC, IN REDACTED FORM WHERE REDACTIONS HAVE BEEN FILED, AND OTHERWISE IN TOTO. On AUGUST 18, 2014, or as soon thereafter as possible, the Office of Administrative Hearings will forward the unsealed versions of all redacted and formerly sealed exhibits to any tribunal before whom there is any review or proceeding pending regarding this matter, for placement in the public record of that tribunal, also placing the unsealed exhibits (redacted or otherwise) in the public record in the contested case files or forwarding same to the appropriate department entity, should the contested case hearing files at that time be in possession of either the Office of Administrative Hearings or another department entity.

The vast majority of the sealed exhibits are sealed because they contain the names of offenders whose supervision was involved in this case, or other identifying information (case numbers on captions, for example). Some exhibits are sealed because they contain names of DOC employees outside of the chain of command directly above Boyington, and/or other personal or personnel information about DOC employees which should not be placed in the public record. One exhibit is sealed because it was not admitted into evidence and is a Final Investigative Report regarding Patrick Kross' complaint against DOC, with the only relevant information regarding that complaint and investigation already in the findings of fact.

All exhibits in the record were prepared by and presented by the parties. The Hearing Officer reached an agreement with the parties that redacted exhibits would be submitted with first post-hearing filings. Tr. V, p. 1038, line 24 though p. 1040, line 4. That did not happen. It is now reasonable to provide the parties with another

opportunity to protect the privacy confidentiality interests by filing redacted versions of the exhibits before those exhibits are put in the public record.

4. SEALED AND NEWLY UNSEALED TRANSCRIPT PORTIONS

Upon review of the Transcript over the course of composing the decision, the Hearing Officer found that almost all of it can be placed in the public record. The court reporters did a remarkable job of removing the names of offenders and replacing them with initials. Some very small redactions of the Transcript, and the removal of two partial pages and two complete pages of testimony, prepare the Transcript for the public record. Therefore, superceding the sealing and unsealing designations in the Transcript, this order addresses the status of the Transcript.

Deferring the date that currently sealed portions of the record are being placed in the public record gives an aggrieved party ten business days from the date of issuance of this order to seek a stay of this order for review of what is to be unsealed before the unsealing takes effect.

Effective at 8:00 a.m., MDT, on August 13, 2014, Volume I of the transcript is unsealed in its entirety and placed in the public record.

Effective at 8:00 a.m., MDT, on August 13, 2014, or as soon thereafter as it is available following the changes to be made by the court reporters, Volume II of the transcript is unsealed in its entirety and placed in the public record, except for the replacements, redactions and sealed pages identified in the numbered subparagraphs following this paragraph. The court reporters are hereby requested to make the following replacements and redactions, providing paper pages, with the replacements and redactions, to counsel previously ordering paper transcripts, for insertion in their transcripts, and providing electronic copies of Volume II, with the replacements and redactions, to any counsel previously ordering such copies:

(1) Replace the name appearing in the last two words on p. 231, line 25, with "POII". Make the same substitution for the same name at p. 232, line 12. Make the same substitution where the first name only appears at p. 233, line 13.

(2) Replace the name appearing in the last two words on p. 408, line 21, with "DOC Employee" (leaving the possessive "'s" after the inserted words, so it reads, "DOC Employee's"). Make the same substitution for the name as it appears in the first two words on p. 409, line 18 (again, leaving the possessive "'s"). Make the same substitution for the first name that appears as the first word on p. 410, line 20.

(3) Page 424, line 20 through page 427, line 2, are sealed and kept out of the public record. Redact lines 20-25 from page 424, and lines 1-2 from page 427, and replace the two full pages with the two redacted pages. Remove pages 425 and 426 entirely from the Transcript. Prepare a Sealed Transcript Volume II containing page 424, lines 20-25, full pages 425 and 426, and page 427, lines 1-2.

Effective at 8:00 a.m., MDT, on August 13, 2014, Volume III of the transcript is unsealed in its entirety and placed in the public record.

Effective at 8:00 a.m., MDT, on August 13, 2014, or as soon thereafter as it is available following the changes to be made by the court reporters, Volume IV of the transcript is unsealed in its entirety and placed in the public record, except for the replacements and redactions identified in the numbered subparagraphs following this paragraph. The court reporters are hereby requested to make the following replacements and redactions, providing paper pages, with the replacements and redactions, to counsel previously ordering paper transcripts, for insertion in their transcripts, and providing electronic copies of Volume IV, with the replacements and redactions, to any counsel previously ordering such copies:

(1) Replace the name appearing on page 763, line 12, with "JM2".

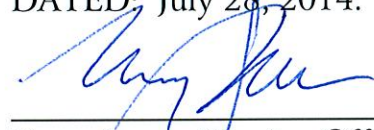
(2) Replace the name appearing on p. 832, line 25, with "DOC Employee". Make the same substitution ("DOC Employee") for the first name as it appears on page 833, lines 5, 7, 13 and 17, and make the same substitution for the first name as it appears on page 834, lines 6, 7 and 17.

Effective at 8:00 a.m., MDT, on August 13, 2014, Volume V of the transcript is unsealed in its entirety and placed in the public record.

SEALING ORDER: The parties hereto and their counsel, and any and all court reporters participating in making the record herein, and the department, and its employees having access to the transcript in the course of performance of their duties, all are barred and prohibited from providing access to any sealed portions of the Transcript or any information contained therein, for so long as the sealing, or any part of it remains in force and effect. **THE COURT REPORTERS ARE HEREBY ORDERED TO PREPARE AND ISSUE A SINGLE VOLUME PROMINENTLY LABELED "SEALED TRANSCRIPT VOLUME II" ON THE FRONT COVER,** containing the entirety of the sealed pages and portions of pages as stated in this order. Counsel of record herein have the right to order one copy each from the court reporters and or an original of "Sealed Transcript Volume II."

5. There is no statement of review rights at the end of this order. Both the parties to the underlying case and any non-parties asserting a public right to know sealed information, may have standing to seek judicial review of this order, pursuant to Montana law. While this order is an agency decision, it may or may not be final as to the parties regarding whether, for certain information in evidence in the above contested case hearing, the demands of individual privacy (or other confidentiality concerns, such as the requirement to maintain the confidentiality of Confidential Criminal Justice Information) clearly exceed the merits of public disclosure. Whether or not this decision is final for the parties in that regard could depend upon whether there is an appeal of the Hearing Officer's Decision and Notice of Administrative Decision to the Montana Human Rights Commission. Should there be such an appeal, the parties therein may request that the Commission extend the deadlines herein for public disclosure by unsealing of certain sealed documents and certain portions of the transcript, and for substitution of redacted documents for sealed documents and/or redacted transcript pages for sealed transcript pages, with the redacted documents/pages being unsealed for public disclosure. That MAY extend the deadline for the parties to seek judicial review of this Order. Non-parties may seek judicial review of this order, as members of the public seeking disclosure of the documents, and such non-parties may choose to monitor redacted filings with the Office of Administrative Hearings as well as monitoring any Commission appeal by a party or subsequent judicial review of the underlying decision, and to await those outcomes before deciding whether to seek judicial review of this sealing order, since during the course of those other proceedings, this sealing order may be modified.

DATED: July 28, 2014.



Terry Spear, Hearing Officer
Office of Administrative Hearings, Centralized Services Division
Montana Department of Labor and Industry

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CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing document were, this day, served upon the parties or their attorneys of record by depositing them in the U.S. Mail, postage prepaid, and addressed as follows, and also faxed to the number listed:

DAVID L VICEVICH / DOLPHY O POHLMAN
VICEVICH LAW FIRM
524 E PARK ST STE B
BUTTE MT 59701
(406) 782-4000

The undersigned hereby certifies that true and correct copies of the foregoing document were, this day, served upon the parties or their attorneys of record by means of the State of Montana's Interdepartmental mail service, and also faxed to the number listed.

JAMES M SCHEIER
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HELENA MT 59620-1440
444-4303

DATED this 20th day of July, 2014.